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SJC-13325

BIPING HUANG & another¹ vs. JING MA & another.²

Middlesex. December 7, 2022. - February 2, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Broker, What constitutes relation, Commission. Frauds, Statute of. Contract, With broker, Implied, Performance and breach. Damages, Breach of contract, Loss of profits. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on August 1, 2017.

The case was heard by Janice W. Howe, J., on a motion for summary judgment.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Charles G. Devine, Jr. (Lei Zhao Reilley also present) for the plaintiffs.

John D. Leone for the defendants.

Stephen M. Perry, for Massachusetts Association of Realtors, amicus curiae, submitted a brief.

¹ WinPlus Realty Group, LLC.

² Xinhang Sun.

KAFKER, J. Biping Huang and her wholly owned real estate brokerage firm, WinPlus Realty Group, LLC (collectively, Huang) sued two former clients, Xinhang Sun and Jing Ma (clients), for breach of contract. Huang alleges that she and the clients orally agreed in May 2016 that she would be the exclusive broker for one year for their purchase of a new home in Winchester and would receive a commission upon the purchase of the new home. In exchange, Huang promised to use "reasonable efforts" to help the clients find and purchase the home, including by "assist[ing] in locating properties, . . . arrang[ing] showings, analyz[ing] financing alternatives, giv[ing] advice concerning real estate practices and procedures, assist[ing] in negotiations, arrang[ing] inspections . . . , and coordinat[ing] activities throughout the process." The contract also provided that, as part of this exclusive arrangement, the clients would "refer" to Huang "all potentially acceptable real property" they identified and would "notify other real estate agents" of the arrangement.

Although Huang performed substantial services pursuant to this contract between May 2016 and February 2017, the clients identified a home on their own. Then, without referring Huang to the listing or notifying the selling broker of the exclusive buyer's arrangement, they purchased the home, using as their

buyer's agent another agent of the brokerage firm that represented the seller. After the purchase, the clients terminated their relationship with Huang via e-mail, recognizing the work she did for them and sending her an Amazon gift card by way of apology.

The motion judge allowed the defendants' motion for summary judgment, as there was no written agreement for brokerage services. The Appeals Court reversed, because there is an express exemption to the Statute of Frauds for real estate brokers. Huang v. RE/MAX Leading Edge, 101 Mass. App. Ct. 150, 151-152 (2022). As "Sun and Ma [did] not otherwise challenge the enforceability of the agreement, nor [did] they argue that Huang will be unable to prove breach and damages," the Appeals Court also "vacate[d] so much of the judgment as grant[ed] summary judgment to Sun and Ma on Huang's claim related to the buyer's agent agreement." Id. A dissenting justice disagreed, as he concluded that the case law provided that a broker may only recover as a matter of law on "such a claim for a commission if the contract on which [the broker relies] contains a clear statement that the broker is entitled to receive a commission . . . regardless of whether the broker played any role in effecting the desired sale or purchase." Id. at 166 (Englander, J., dissenting in part). As the alleged contract

did not contain such an express term, the dissent would have affirmed summary judgment. Id.

We granted further appellate review to clarify the law in cases involving breach of an exclusive real estate broker agreement. Taking the facts in the light most favorable to Huang, we conclude that an enforceable contract was created, the clients committed a breach of it, and Huang was entitled to her expectation damages. Therefore, the judge should have denied summary judgment.³

Background. 1. Home search. Huang is a licensed real estate broker in Woburn. At the time that the events giving rise to this litigation began, the clients, a married couple, lived in a condominium in Winchester, but they were looking to sell their property and buy a house.

Huang alleges (and the clients dispute) that on May 22, 2016, she and the clients entered into an oral exclusive buyers' agency agreement. According to Huang, she would provide the assistance described above, and upon the clients' purchase of a new home, Huang would be entitled to two to 2.5 percent of the sale price, via a fifty percent split of the listing fee with the listing agent, or the clients' direct payment of two percent of the sales price if there were no listing fee. As the

³ We acknowledge the amicus brief submitted by the Massachusetts Association of Realtors.

agreement was exclusive, the clients also agreed to refer potential homes to Huang and to notify brokers of such homes of the exclusive agency relationship. The contract term was for one year.⁴

Huang showed the clients at least ten properties in Winchester between May 2016 and February 2017. She arranged the showings, assisted the clients with mortgage applications, and provided them market analyses and recommendations. The clients made offers on four homes but ultimately did not purchase any of the four. The parties also discussed Huang extending a bridge loan of around \$100,000 to the clients to purchase one of the properties. Although Huang's husband prepared a cashier's check, the loan was never made.

On February 18, 2017, the clients made an offer on a home on Bridge Street in Winchester for \$999,000, without notifying Huang. The offer was accepted the same day. RE/MAX Leading Edge (RE/MAX) represented both the sellers and the buyers through different agents. According to a RE/MAX representative, the RE/MAX agent asked the clients if they were working with a buyer's agent, and they informed her that they were not.

⁴ According to amicus briefing, these terms are typical of such agreements, although they are usually set out in writing.

The clients terminated their relationship with Huang on February 20, 2017, sending her the following message in Chinese via e-mail:

"We have decided to hire an American agent at Re/Max to buy a house. Because that house has not yet been listed on the market, they would not agree to have you contact them as our buyer's agent on our behalf.^[5] Therefore we really are very sorry. After all you have shown us many houses, responded to every request from us, and left no questions from us unanswered. We have prepared an Amazon gift card for you. It is merely a token of our appreciation and we cannot express our gratitude enough. Please accept it."

The clients then closed on the new house on May 15, 2017, and sold their condominium on April 26, 2018.

2. Procedural history. On August 1, 2017, Huang sued the clients, alleging breach of the exclusive buyer's agency agreement.⁶ The clients moved for summary judgment on July 27, 2018. The judge granted the motion because there was no written agreement. The Appeals Court vacated the grant of summary judgment, recognizing that the Statute of Frauds has an express

⁵ In its response to Huang when she complained about RE/MAX's actions, a RE/MAX representative wrote not only that the clients did not inform RE/MAX about Huang's arrangement, but also that "[i]t is not a brokerage or RE/MAX Leading Edge policy with respect to buyers['] agents being able to show new construction listings."

⁶ Huang also alleged breach of a seller's agency agreement, as Huang was also asked to assist in selling their existing home, and sued RE/MAX for several business torts. In addition, the clients brought a counterclaim that Huang had engaged in unfair business practices, which the parties stipulated to dismiss without prejudice prior to the appeal.

exemption for contracts involving compensation for real estate broker services.⁷ Huang, 101 Mass. App. Ct. at 154, citing G. L. c. 259, § 7. Thus, a written agreement was not required to create an enforceable contract. The Appeals Court further concluded that the remedy for breach of an exclusive real estate buyer's broker contract, like other contracts, is the payment of expectation damages -- in this case, the lost commission. Huang, supra at 163. A dissenting justice disagreed on the ground that an exclusive brokerage agreement does not allow for recovery of a commission unless the contract contains a "clear statement" providing for recovery regardless of whether the broker played any role in bringing about the desired sale or purchase. Id. at 166 (Englander, J., dissenting in part).

This court granted the clients' application for further appellate review, limited to the issue dividing the Appeals Court: what remedy is available for breach of an exclusive agency contract in these circumstances.

Discussion. "Our review of a decision on a motion for summary judgment is de novo." HSBC Bank USA, N.A. v. Morris, 490 Mass. 322, 326 (2022), quoting Berry v. Commerce Ins. Co.,

⁷ The Appeals Court also affirmed the motion judge's dismissal of Huang's claim regarding the seller's agency agreement, as well as the dismissal (at an earlier stage of litigation) of her claims against RE/MAX and its owner, Paul Mydelski. Huang, 101 Mass. App. Ct. at 164-165. These rulings are outside the scope of the present review.

488 Mass. 633, 636 (2021). The moving party is entitled to summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, "there is no material issue of fact in dispute and the moving party is entitled to judgment as a matter of law." HSBC Bank USA, N.A., supra. As Huang is the nonmoving party, we present and review the facts in the light most favorable to her.

1. Contract formation and breach. When the facts are considered in the light most favorable to Huang, there is sufficient evidence to conclude that a contract was formed and that a breach occurred in the instant case, entitling Huang to her expectation damages. As a preliminary matter, and as recognized by both the majority and dissent of the Appeals Court, a real estate brokerage contract need not be in writing to be enforceable. The Statute of Frauds expressly states that it "shall not apply to a contract to pay compensation for professional services of . . . a licensed real estate broker or real estate salesman acting in their professional capacity." G. L. c. 259, § 7. Thus, oral agreements with brokers are permitted.

In the instant case, according to Huang, the parties orally agreed that in return for providing various services to help the clients find and purchase a new home (including assistance in identifying, visiting, and inspecting the properties;

negotiating the price and financing of the properties; understanding real estate practices and procedures; and coordinating other activities from the beginning to the end of the purchase process), Huang was to serve as the clients' exclusive buyer's agent and was entitled to be paid a fee upon the ultimate purchase of a home.⁸ We thus have a reciprocal exchange of benefit and detriment constituting consideration, and therefore an enforceable contract. See Miller v. Cotter, 448 Mass. 671, 684 n.16 (2007), citing Marine Contrs. Co. v. Hurley, 365 Mass. 280, 286 (1974) ("reciprocal exchange of benefit and detriment constitutes consideration"); Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528, 529-530 (1877) ("To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or

⁸ As required by regulation, Huang and the clients also signed the Massachusetts Mandatory Licensee Consumer Relationship Disclosure form, "clearly disclos[ing] the relationship of the broker . . . with the prospective purchaser." 254 Code Mass. Regs. § 3.00(13)(a) (2005). That agreement defined a buyer's agent as follows: "A buyer can engage the services of a real estate agent to purchase property and the real estate agent is then the agent for the buyer who becomes the agent's client. This means that the real estate agent represents the buyer. The agent owes the buyer undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality and accountability, provided, however, that the agent must disclose known material defects in the real estate. The agent must put the buyer's interests first and negotiate for the best price and terms for their client, the buyer."

inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made").

According to Huang, as part of the arrangement, the parties also expressly agreed that the clients would refer all potentially acceptable property to Huang and to notify other brokers of the exclusive agency. Taking the evidence in the light most favorable to Huang, the clients did not inform Huang about the RE/MAX listing, nor inform RE/MAX about their arrangement with Huang, all in violation of the express terms of the oral agreement. Instead, RE/MAX ended up as both buyer's and seller's agent in the purchase of the new home, again, in violation of Huang's exclusive right to serve as the buyer's agent.⁹ Upon the purchase of the home, RE/MAX received the commission that Huang was contractually entitled to receive if she had been the buyer's agent.

Therefore, in the light most favorable to Huang, the parties made reciprocal obligations establishing consideration and an enforceable contract. Huang complied with her contractual obligations, until performance was prevented by the clients' breach. Finally, the clients committed a breach of their obligations to utilize Huang as their exclusive buyer's

⁹ By statute, a real estate broker may represent "more than one party to a real estate transaction" through separately "designated agents," provided both parties give "informed written consent." G. L. c. 112, § 87AAA 3/4 (c).

agent; to refer listings, including the RE/MAX listing, to Huang as such exclusive buyer's agent; to inform other brokers of that relationship; and to pay Huang the commission owed to the buyer's agent upon the purchase of the home. We therefore turn to the remedy provided for such a breach of an exclusive buyer's agent agreement.

2. Expectation damages. An aggrieved party in a contractual dispute is entitled to damages that give it "the 'benefit of the bargain,' that is, place the aggrieved party in roughly the same position in which it would have been had the party committing the breach complied with the contract." 275 Wash. St. Corp. v. Hudson River Int'l, LLC, 465 Mass. 16, 28 (2013). See Selmark Assocs. v. Ehrlich, 467 Mass. 525, 543 (2014), quoting Quinn Bros. v. Wecker, 414 Mass. 815, 817 (1993) ("The fundamental premise of 'contract damages is that the aggrieved party should be put in as good a position as if the other party had fully performed"). Expectation damages may include the "lost profits" to which a party would have been entitled. Situation Mgt. Sys, Inc. v. Malouf, Inc., 430 Mass. 875, 880 (2000) (Situation Mgt.). See Huang, 101 Mass. App. Ct. at 156, quoting Randall v. Peerless Motor Car Co., 212 Mass. 352, 380 (1912) ("loss of prospective profits as an element of damages for breach of contract . . . may be recovered when it appears to have been within the contemplation of the parties as

a probable result of breach"). See also Lattuca v. Cusolito, 343 Mass. 747, 753 (1962) (exclusive real estate agent may recover "the amount of commissions which she might have earned on sales had she not been prevented from fully performing the contract").

In the instant case, again taking the facts in the light most favorable to Huang, as we are required to do, Huang could reasonably expect the benefit of the bargain she had struck with the clients had they also complied with their contractual obligations. In particular, she was entitled to the compensation she had contracted to receive as the exclusive buyer's agent for the services she had provided in assisting them, given that they did successfully purchase a home. Her compensation was to be a commission, a percentage of the purchase price. There are numerous cases in the Commonwealth providing that the amount of a lost commission can be awarded as expectation damages for breach of an exclusive agency agreement.¹⁰ See Lattuca, 343 Mass. at 753; O'Malley v. Markus,

¹⁰ Other jurisdictions have also ruled that a lost commission can be awarded as expectation damages for breach of an exclusive real estate agency agreement, although, as in Massachusetts, most cases concern sellers' agreements. See Huang, 101 Mass. App. Ct. at 160-161 & n.14 (collecting cases). When considering a buyer's agency agreement, the Connecticut Appellate Court determined that a lost commission was an appropriate damages measure for breach, because it was "a commission the plaintiff would have earned if the defendants had continued to work with . . . the plaintiff's agents, as the

339 Mass. 766, 770 (1959); Samuel Nichols, Inc. v. Molway, 25 Mass. App. Ct. 913, 915 (1987) (Molway) ("broker was entitled to its commission" when seller committed breach). See also Malloy v. Coldwater Seafood Corp., 338 Mass. 554, 562-563 (1959) (recovery of commission for seafood sales allowed if exclusive agency was revoked in bad faith by principal); Wier v. American Locomotive Co., 215 Mass. 303, 310 (1913) ("measure of the plaintiff's damages [was] the usual commission on the list price of the taxicabs that were sold by the defendant, in violation of the [exclusive agency] contract").

We do not agree, as suggested by the dissent in the Appeals Court, that this would result in a broker receiving a commission from a transaction in which she played no role. See Huang, 101 Mass. App. Ct. at 166 (Englander, J., dissenting in part). Huang provided substantial services throughout the ten-month period in which the clients were searching for a home. After benefiting from Huang's assistance and guidance -- including learning about what was available on the market at different price points and gaining experience in the negotiation process through assistance on prior failed bids -- the clients sought to avoid the detriment to which they had agreed, which was to refer the RE/MAX listing to her, to inform RE/MAX of their exclusive

agreement required them to do." William Raveis Real Estate, Inc. v. Zajackowski, 172 Conn. App. 405, 420 (2017).

relationship with Huang, and to pay her the buyer's agent fee upon the purchase of the home. Awarding her such a fee after she had performed the services required of her would not provide her a windfall, but rather the value of the benefit set out in the contract.¹¹ See Selmark Assocs., 467 Mass. at 543 ("contract damages should not exceed the value of the benefit of which [aggrieved party] was deprived").

We also decline to adopt a rule that precludes recovery of expectation damages unless the contract on which the broker relies contains a clear statement that "the broker is entitled to receive a commission . . . regardless of whether the broker played any role in effecting the desired sale or purchase." Huang, 101 Mass. App. Ct. at 166 (Englander, J., dissenting in part). We will not create such an exception to the ordinary rules of contract formation, breach, and expectation damages. See Lattuca, 343 Mass. at 753; Molway, 25 Mass. App. Ct. at 915.

¹¹ At trial, of course, the clients may prove that RE/MAX would have refused to deal with them had they insisted on using Huang rather than a RE/MAX broker as the buyer's agent, and thus, no purchase would have occurred. We do not address in this opinion the legal effect of such a finding if made at trial on the remedy to which Huang may be entitled. For summary judgment purposes, this appears to be a material, disputed fact. The clients wrote in their e-mail message that RE/MAX "would not agree" to let them use Huang as their buyer's agent, but according to RE/MAX, the clients did not inform RE/MAX of the exclusive agency in the first place. RE/MAX's response did also, however, include the somewhat cryptic statement that "[i]t is not a brokerage or RE/MAX Leading Edge policy with respect to buyers['] agents being able to show new construction listings."

This is a private transaction between private parties. We "accord individuals broad powers to order their affairs through legally enforceable agreements." Rawan v. Continental Cas. Co., 483 Mass. 654, 665-666 (2019), quoting Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 320 (1996). See DeMarco v. DeMarco, 89 Mass. App. Ct. 618, 624 (2016), citing Knox v. Remick, 371 Mass. 433, 436-437 (1976) ("a signatory to an agreement is bound by its terms").

We do recognize, however, the legitimate concern that buyers and "sellers, unlike brokers, are involved in real estate transactions infrequently, perhaps only once in a lifetime, and are thus unfamiliar with their legal rights." Tristram's Landing, Inc. v. Wait, 367 Mass. 622, 630 (1975) (Tristram's Landing). See Currier v. Kosinski, 24 Mass. App. Ct. 106, 107 (1987). Importantly, the agreement here is not one where the specific terms have been left undefined to the detriment of an inexperienced client. Contrast Tristram's Landing, supra at 625; Des Rivieres v. Sullivan, 247 Mass. 443, 445 (1924). Here, at least in the light most favorable to Huang, the buyers' and broker's respective obligations, including the requirements to refer houses identified by the buyers to the broker, to inform other brokers of the exclusive relationship with Huang, and to pay Huang the commission owed the buyers' agent upon the purchase of the home, were plainly and specifically set out in

the contract. Thus, the contract has been presented "with enough specificity to alert [the buyers] to the situations in which [the buyers] can be liable." Currier, supra. In this context, the concern regarding an inexperienced buyer has been adequately addressed by the contract provisions themselves.¹²

We also conclude that the case law that was the subject of the dispute between the majority and the dissent in the Appeals Court is distinguishable. In these cases, the court was typically interpreting barebones contracts that simply provided that the agent was to serve as the exclusive representative of the seller of the property and would be paid upon the sale of the property. See Bartlett v. Keith, 325 Mass. 265, 265 (1950) (contract stated only that agent had "exclusive sale" of property and addressed no other contingencies); Des Rivières, 247 Mass. at 445 (contract provided that "exclusive agent" would be paid "broker's commission . . . when a sale is consummated" and did not specify time limit for exclusive agency). In

¹² Concern about this bargaining inequality, particularly for buyers, has also resulted in legislative action requiring clarification and mandatory disclosure of the duties brokers owe their clients, and recognition of buyers', as well as sellers', agents. See G. L. c. 112, § 87AAA 3/4; Olazábal, Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses, 40 Harv. J. on Legis. 65, 76-77 (2003) (legislative reform in Massachusetts and other States has provided for creation and enforcement of new forms of agency representation, including buyers' agents).

Tristram's Landing, 367 Mass. at 623, the broker contract was not even exclusive.

In this context, this court struggled with whether or how to fill the gaps in such sparsely worded arrangements and to resolve the disputes that arose when the seller identified a buyer without any assistance from the seller's broker. The contract in the instant case, however, included very specific requirements for how the exclusive arrangement would function, including both Huang's obligations to the clients and how to address properties identified by the clients themselves -- they were required to refer the properties to Huang and notify other brokers of the exclusive arrangement. We do not interpret these cases to require the clear statement that the dissenting Appeals Court justice described when the contract clearly sets out the respective obligations of the parties, as it does here, at least according to Huang.

In addition, we emphasize that these cases not only involved different and less specific contractual language, but also predated the advent of buyers' agents, multiple listings, and the Internet's ubiquitous display of such listings to buyers and sellers, all of which have dramatically changed the marketplace in which such agreements are entered into and enforced. See Nadel, *Obstacles to Price Competition in the Residential Real Estate Brokerage Market*, 18 Berkeley Bus. L.J.

90, 92 (2021) ("about half of buyers today are finding the home they buy themselves online [up from 2 percent in 1997]"); Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 Harv. J. on Legis. 65, 66-67 (2003) (explaining that prior to early 1990s, both agents essentially represented seller, as agent and subagent, and it was not until 1990s that concept of buyer's representative, with duty of undivided loyalty owed to buyer, was developed). As ably explained by the amicus, the older cases addressed the responsibilities of sellers' agents under differently worded agreements formed in a "bygone" era well before multiple listings and buyers' agents became common. Indeed, it was not until 1993 that "the Board of Registration of Real Estate Brokers and Salespersons promulgated forms that for the first time recognized buyer agency in the Commonwealth."

Our ruling today thus reflects not only the specific language of the exclusive buyer's agency arrangement to which the parties agreed in the instant case, but also the new realities of the Twenty-first Century residential real estate market, including not only the recognition of buyer's agents with defined duties but also the destabilizing effect of multiple listings and the ubiquitous display of such listings on the Internet on buyers, sellers, and brokers alike. See Humphrey v. Byron, 447 Mass. 322, 326 (2006), quoting Wesson v.

Leone Enters., Inc., 437 Mass. 708, 720 (2002) ("in the commercial context, we have recognized that the notion of a lease as a conveyance 'no longer comports with the reality of the typical modern commercial lease'"); Stanley v. Ames, 378 Mass. 364, 367 n.8 (1979), quoting B.N. Cardozo, *The Nature of the Judicial Process* 155 (1925) ("this branch of the law" ought to be placed "upon a basis more consistent with the realities of business experience").

Buyers of residential real estate may of course choose to attempt to find a house on their own, including drawing on the vast resources of the Internet, or they may seek the assistance of an exclusive broker, but if they choose the latter, they must abide by the express terms of their contractual agreement. The broker must likewise comply with its contractual obligations and fulfill its significant statutory and regulatory duties to the client as well, which include undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality, and accountability.

Conclusion. It is a fundamental principle of contract law that, in the event of breach, "the injured party should be put in the position they would have been in had the contract been performed," if possible. Situation Mgt., 430 Mass. at 880. Thus, if Huang can prove, as attested in her affidavit, that the clients committed a breach of an exclusive agreement under which

she would have been entitled to a commission, the clients may be liable for the amount of the lost commission. The order granting the clients' motion for summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.